as the decision of a court of last appeal. There is a conflict in practice whether the right of appeal is thus lost.[2] It certainly expedites matters to deny the appeal, and while there is unquestionably hardship to the one party in denying it, there is also hardship to the other in allowing it; for he is thereby subjected to unnecessarily protracted litigation.

There is vigorous dissent from the rule in several states,[3] which point out that courts waver between *stare decisis* and *res judicata* as the basis for the rule, and contend that it cannot be supported on either — not on *stare decisis*, because the former holding is absolutely conclusive; not on *res judicata*, because the rule is applied where, as in the principal case, no judgment is given, and the case is merely remanded for a new trial. Obviously the doctrine has nothing to do with *stare decisis*; for admittedly the court would repudiate its holding if it were proffered in another case. And, equally obviously, a matter cannot be *res judicata* unless there has been a judgment. But it is not conceived how the higher court can reverse the decision of the trial court and remand the case for a new trial without adjudicating anything. The adjudication may be on a question purely of law; and so it has been said that, since *res judicata* depends on estoppel and since there can be no estoppel on a question of law, the doctrine again falls from that basis.[4] *Res judicata*, however, does not depend on estoppel:[5] it means simply that the judgment of the court has settled the case between the parties, and there is no good reason why it should not apply to an issue of law.

THE ENGLISH VIEW OF CAPACITY IN INTERNATIONAL MARRIAGES. — In the light of the adjudged cases and the language used in deciding them, it is difficult to say whether an English court will apply the *lex loci* or the *lex domicilii* to determine matrimonial capacity.[1] Professor Dicey[2] thinks that *Ogden* v. *Ogden*[3] has lessened the authority of the sweeping *dicta* in *Sottomayer* v. *de Barros I;*[4] but his recently issued book states the domiciliary law still to be supreme, with "possible doubtful exceptions."[5] However, Lord Barnes, who delivered the judgment in *Ogden* v. *Ogden*, has lately decided, in words strongly favoring the *lex loci*, that a Hindu who marries an English girl in England cannot set up against the validity of the marriage a disability imposed upon him by the law of his caste. *Venugopal Chetti* v. *Venugopal Chetti*, 25 T. L. R. 146 (Eng., Prob. Div., Dec. 7, 1908).

It is noteworthy that here by no ingenuity can the alleged defect be twisted into one of form or ceremony,[6] as to which all agree that the local law should

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[2] Sidenback *v.* Riley, 111 N. Y. 560; Geraghty *v.* Randall, 18 Colo. App. 194.
[3] Hastings *v.* Foxworthy, 45 Neb. 676. But see Smith *v.* Neufeld, 61 Neb. 699.
[4] 18 HARV. L. REV. 389.
[5] See Wells, Res Adjudicata and Stare Decisis, 1.

[1] See 15 HARV. L. REV. 382; 18 *ibid.* 226; 2 Beale, Cas. Conf. Laws, 41 ff.
[2] Dicey, Conf. Laws, 2 ed., 838.
[3] [1908] P. 46.
[4] L. R. 3 P. D. 1.
[5] Dicey, Conf. Laws, c. xxvii.
[6] Thus the adherents of the domiciliary doctrine explain Simonin *v.* Mallac, 2 Sw. & Tr. 67, and Ogden *v.* Ogden, *supra*, where the parental consents required by French law were lacking.

govern.[7] Either the case stands for the principle that the local law should also govern capacity; or it falls under one or the other of Professor Dicey's illogical exceptions,[8] namely, that an English marriage is not affected by the incapacity of the foreign party which does not exist in England,[9] or that the English court will not recognize certain kinds of incapacity.[10] The former exception seems to be the practical result of any doctrine of personal law as to capacity;[11] the latter illustrates the force of the suggestion that whichever theory of matrimonial capacity prevails in a given jurisdiction, many of the decisions will be exceptions based on the "distinctive national policy" of the forum.[12] Granted that, it remains to inquire which theory the English courts have adopted as the general rule.

Of the seventeen or so pertinent English decisions from the middle of the eighteenth century to date, a dozen appear to have applied the *lex loci;* but five of these may also be based on some point as to sufficient ceremony,[13] four on the non-extraterritorial effect of statutes,[14] and two, including the principal case, on Professor Dicey's above-mentioned exceptions;[15] one weak *semble* survives.[16] On the other hand, if the principle of the *lex loci* be the answer, four of the five cases apparently *contra* may be explained as applying an extraterritorial prohibition intended by the legislature;[17] one strong case remains unreconciled.[18] Hence, inasmuch as none of these precedents are likely ever to be overruled, it is submitted that the domiciliary theory expresses more accurately the present state of English law.

A point raised by counsel in the principal case, but not adverted to in the opinion as now reported, was whether the fact that Hindu law allows polygamy invalidated the marriage. The English courts have upheld a non-Christian monogamous marriage in Japan of an Englishman and a Japanese,[19] but have refused to recognize the union celebrated abroad of an Englishman with a Mormon,[20] or with an African tribeswoman,[21] the English domicile having been lost, on the ground that the court can deal only with a monogamous status. But if the place of celebration does not affect the validity of the status, it would follow that the principal decision is not consistent with these. Obviously, however, the court is right in protecting the English girl; the case exemplifies the tendency toward inconsistencies which the domiciliary doctrine involves. The best method of meeting the dilemma in this

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[7] Kent *v.* Burgess, 5 Jur. 166; Herbert *v.* Herbert, 2 Hagg. Cons. 263; Lacon *v.* Higgins, 3 Stark. 178.

[8] Dicey, 628, 633.

[9] Sottomayer *v.* de Barros II, L. R. 5 P. D. 94.

[10] A monk incapable by the law of his domicile can marry in England. Dicey, 634, citing Co. Lit., 136 a. An Austrian Jew can marry a Christian in America, though incapable by Austrian law. 1 Wharton, Conf. Laws, 3 ed., 343.

[11] *Cf.* 2 Beale, Cas. Conf. Laws, 32 ff.

[12] 1 Wharton, Conf. Laws, § 165.

[13] Scrimshire *v.* Scrimshire, 2 Hagg. Cons. 395; Middleton *v.* Janverin, 2 Hagg. Cons. 437; Dalrymple *v.* Dalrymple, 2 Hagg. Cons. 54; Simonin *v.* Mallac, *supra;* Ogden *v.* Ogden, *supra.*

[14] Compton *v.* Bearcroft, Buller N. P. 114; Kynnaird *v.* Leslie, 1 C. P. 389; *In re* Bozzelli, [1902] 1 Ch. 751; *In re* Green, 25 T. L. R. 222.

[15] Sottomayer *v.* de Barros II, *supra.*

[16] *In re* Alison, 23 W. R. 226.

[17] Brook *v.* Brook, 9 H. L. Cas. 193; Mette *v.* Mette, 1 Sw. & Tr. 416; *In re* de Wilton, [1900] 2 Ch. 481; Sussex Peerage Case, 11 Cl. & F. 85.

[18] Sottomayer *v* de Barros I, *supra.*

[19] Brinkley *v.* Att'y-Gen'l, L. R. 15 P. D. 76.

[20] Hyde *v.* Hyde, L. R. 1 P. & D. 130.

[21] *In re* Bethell, L. R. 38 Ch. D. 220.

instance would be to reason that the parties intended a monogamous union, if any. The theory of the *lex loci* affords a simpler reason : the Hindu submitted to the law of England, that is, to monogamy.[22]

HEIRLOOMS AND DISPOSITIONS OF PERSONALTY TO FOLLOW LIMITATIONS OF REALTY. — Future limitations of chattels personal may be effected in England by will, and in this country either by deed or by will.[1] The nature of the interest so created depends on the nature of the interest given the particular tenant. The early English cases held that a gift to A for life gave him the absolute title,[2] and that, consequently, any succeeding gift was executory, and so within the operation of the rule against perpetuities. But, as the law developed, it was seen that there was no reason why, on a gift to A for life, then to B in fee, B's interest should not be treated as vested: such accordingly became the English law,[3] A enjoying the use and occupation only. This is probably the American law.[1] Unfortunately, the law in England seems to have returned to its original conception, and B's interest is today treated as executory.[4]

Such chattels as are proved by special custom to go to the heir, and a very restricted list of particular chattels, like armor, pennons, ensigns of honor, are called heirlooms.[5] They are transferable by the present owner during life,[6] but a bequest can be avoided by the person to whom the realty has descended or been devised.[7] They follow the rules of realty by operation of law. With this as a guide-post the English courts have decided that if ordinary, non-consumable chattels are given to go along with certain realty "as heirlooms," or "so far as the rules of law or equity permit," each succeeding life-tenant of the realty takes only a life interest in the chattels, and the absolute ownership vests in the first tenant-in-tail on his birth; [8] for there can be no entail of personalty. In reality this is inconsistent with the theory that a gift for life of a chattel carries the absolute interest, since a book, picture, or kitchen chair is not made an heirloom by calling it one.[9] It is either an established exception to the present English rule, or proves

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[22] The American courts recognize the marriage of white and Indian, despite the tribal custom of polygamy. 2 Beale, Cas. on Conf. of Laws, 80 *n.*

[1] Gray, Rule Perp., 2 ed., §§ 91, 88, 854. The law of North Carolina is *contra* as to deeds. Cutlar *v.* Spillar, 2 Hayw. (N. C.) 130. A recent writer believes that such future limitations in England can be created by deed as well as by will. Mr. David T. Oliver in 24 L. Quar. Rev. 341, 432.

[2] Bro. Ab., Devise, 13. For conflicting opinions as to the ancient reason for this, see 3 HARV. L. REV. 315; 14 *ibid.* 408.

[3] 2 Bl. Comm. 398; Hoare *v.* Parker, 2 T. R. 376; 14 HARV. L. REV. 417–420. As to chattels real, see Gray, Rule Perp., 2 ed., § 817 *et seq.*

[4] *In re* Tritton, 6 Morr. Bank. Cas. 250. But see 24 L. Quar. Rev. 431.

[5] Williams, Executors, 10 ed., 545–549; 2 Bl. Comm. 17, 428; Corven's Case, 12 Co. 105. *Cf.* Hill *v.* Hill, [1897] 1 Q. B. 483, 494–496. Blackstone says the word is derived from the Saxon "loom," meaning limb or member, and so signifies a limb or member of the inheritance. 2 Bl. Comm. 427. Heirlooms should be carefully distinguished from fixtures.

[6] 2 Bl. Comm. 429. See Cro. Car. 344.

[7] Co. Lit., 18 b, 185 b; Tipping *v.* Tipping, 1 P. Wms. 730; Williams, Pers. Prop., 15 ed., 128.

[8] Scarsdale *v.* Curzon, 1 J. & H. 40; *In re* Fothergill's Estate, [1903] 1 Ch. 149. The same rule applies to trust gifts.

[9] See Gray, Rule Perp., 2 ed., § 363 n., explaining the difference between the legal and popular meaning of the word. *Cf.* Haven *v.* Haven, 181 Mass. 573, 578.